In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1147.

FRANK G. RATH,
Individually and as President of Hotel and Restaurant Employees' International Alliance, Cooks' Local Union No. 167, *et al.*,
Petitioners,

vs.

PEARL E. CROSBY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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I.

STATEMENT OF THE CASE.

This is approximately the fifteenth stage of protracted litigation over the identical issue and the second time that this case has reached this Court.

Petitioner's "Summary Statement" fails to mention two important facts which we now supply, namely, that in granting the permanent injunction the Supreme Court of Ohio found that the following facts were "not in serious dispute":

> "* * * that on October 4, 1937, the defendants began to picket plaintiff's restaurant; that the number of persons engaged in picketing varied from 40 to 100; that these persons wore union badges and obstructed the entrance to the plaintiff's restaurant; that they called the plaintiff's employees vile and obscene

names; that they threatened, assaulted, struck and injured some of the plaintiff's employees, one of whom suffered a fractured jaw; that plaintiff's restaurant was stenchbombed on two occasions; that a dynamite bomb was exploded at the place of the plaintiff's former residence; that an attempt was made to bomb the plaintiff's present residence; that the home of one of the plaintiff's employees was stenchbombed; that the homes of some of plaintiff's customers were stenchbombed; that some of the plaintiff's customers who drove to her restaurant found the tires of their automobiles cut and punctured while there; that anyone attempting to deliver supplies to plaintiff's restaurant was insulted and threatened; that one delivery truck driven by a union driver was seized and partially burned; and that during the period of picketing the plaintiff's business was reduced to approximately one-third of its former volume."

And, as to each of plaintiff's present employees,

"That each employee is serving under a renewable, written, three-month contract."

Appendix to Petition for Writ of Certiorari, pages 16 and 17.

II.

SUMMARY OF ARGUMENT.

We respectfully submit that certiorari should be denied in this case for the following reasons:

A. The Federal question stated was not seasonably raised nor decided.

B. The judgment of the State Court is based on non-Federal grounds adequate to support it.

C. The Federal question raised is not substantial because:

(1) It involves merely the sufficiency of the evidence to support the finding;

(2) The decision of the State court was clearly justified.

III.

ARGUMENT.

A. THE FEDERAL QUESTION STATED WAS NOT SEASONABLY RAISED NOR DECIDED.

When this case was before this Court at the *October Term, 1940, No. 187* (312 U. S. 690), respondent advanced four principal reasons why certiorari should be denied:

1. That no federal question was either presented to or decided by the State Court.
2. That according to local law no legitimate trade dispute existed.
3. That the picketing was accompanied by excessive violence.
4. That respondent's employees were bound by valid employment contracts.

This Court did not state the reasons for denying certiorari but because the decision was rendered on the same day as *American Federation of Labor vs. Swing*, 312 U. S. 321, and *Milk Wagon Drivers' Union et al. vs. Meadowmoor Dairies, Inc.*, 312 U. S. 287, ground (2) above may be disregarded. Had this Court found that the factual situation in our case was similar to that in the *Swing* case, it would have reversed the decision of the Ohio court as it did the decision of the New Jersey court in *Journeyman Tailors' Union vs. Miller's, Inc.*, 312 U. S. 658. Respondent may therefore reasonably surmise that this Court found merit in one or more of the other three points.

Assuming that the first point was decisive, namely, that the federal question was neither presented nor decided in the State court, petitioners believe they have invented a formula for circumventing this jurisdictional requirement in equity cases. This formula assumes that if a petitoner is denied admittance to this Court because he has failed to save the federal question (as occurred not only in the *Crosby* case but in the more recent cases of *Springfield,*

Ohio, Local No. 352, et al., vs. Settos, 314 U. S. ...., 62 S. Ct. 123, 86 L. Ed. 89, and *Opera on Tour, Inc., vs. Weber,* 314 U. S. ...., 62 S. Ct. 96) he has another method of entry immediately available, namely, he need only attack the decree by filing a motion to modify the order, requesting therein that there be stricken from the order the only portion in controversy and therein for the first time to assert the federal question.

Manifestly this is the equivalent of an application for a rehearing of the former petition for certiorari. It is analogous to the situation where an appellant, who has failed to take a timely appeal, applies for or obtains a rehearing for the sole purpose of extending his time for appeal. Cf. *Wayne United Gas Co. vs. Owens-Illinois Glass Co.,* 300 U. S. 131. It would seem that this Court should not permit petitioners to employ this subterfuge to cure their original non-compliance with jurisdictional requirements for review. If the federal question is not raised at any stage in the State Court, and this Court declined jurisdiction for that reason, the omission ought not to be curable by the device of a motion to modify the original decree.

B. THE JUDGMENT OF THE STATE COURT IS BASED ON NON-FEDERAL GROUNDS ADEQUATE TO SUPPORT IT.

The Ohio Supreme Court said:

> "The question as to the validity of the three-month, written, renewable employment contracts here involved requires no discussion. Obviously the Court of Common Pleas and the Court of Appeals held them valid, and a study of the record disclosed nothing tending to support the contention of the defendants to the contrary."
>
> *Appendix to Petition for Certiorari,* page 18.

Petitioners had notice of the existence of the contracts and their acts were not only calculated to induce, but were for the express purpose of inducing, the breach thereof by

the employees or by the respondent. Petitioners admitted that it was their purpose to compel respondent to discharge her employees in breach of the contracts and to replace them with members of petitioners' organizations. *Appendix to Petition for Writ of Certiorari,* p. 18.

There were no contracts in the facts of either the *Meadowmoor* or *Swing* cases.

Petitioners' motion to modify alleged no change in petitioners' purpose, nor in the existence or effect of the employment contracts.

It is good common law in Ohio, as elsewhere, that it is illegal to persuade another to break a valid employment contract for a definite period of time.

> *LaFrance v. Electrical Workers,* 108 O. S. 61, 94;
> *Hamilton Tailoring Co. v. Joint Board,* 132 O. S. 259.

The Ohio Supreme Court having found these contracts valid, picketing for the express purpose of attempting to compel the breach of these contracts was clearly directed to an unlawful objective and was therefore illegal under Ohio law. If a State court reasonably concludes that the labor objective sought is illegal, it can deny immunity to a labor union for injuries inflicted by activities designed to achieve that purpose. A decree restraining such activities does not infringe constitutional rights and does not present any federal question. See *Opera on Tour, Inc. vs. Weber, Inc.,* 285 N. Y. 348, 34 N. E. (2d) 349, certiorari denied, 86 L. ed. (Adv.) 66.

C. THE FEDERAL QUESTION RAISED IS NOT SUBSTANTIAL BECAUSE

(1) It involves merely the sufficiency of the evidence to support the finding.

Assume that the third point was decisive, namely, that the picketing was accompanied by excessive violence, petitioners have seized upon one paragraph in the *Meadowmoor* case as support for their attempt to re-litigate the issues. Again they believe that they have found an easy expedient to obtain multiple trials and multiple reviews of the same issues. If their contrivance is successful, then every prior injunction, whenever entered, whether erroneously decided contrary to the doctrine of the *Swing* case or correctly decided in accordance with the doctrine of the *Meadowmoor* case, may now be re-litigated in this Court for asserted violations of the due process clause. Moreover, the losing party can make successive applications for modification and urge each denial as an impairment of his constitutional rights.

The net result of such procedure would make this Court an arbiter of factual questions, and would narrow the scope of the powers of State courts to determine finally the controlling facts of particular controversies.

There is nothing in the opinion of the *Meadowmoor* case that requires such result. The paragraph quoted in petitioners' brief (pages 7 and 14) repeats a rule of "familiar equity procedure" that a court which grants an injunction has the power to modify it at a later date when it is convinced that a change in circumstances renders it of no further benefit to the plaintiff and makes it unjust to the defendant.

In passing upon such an application the chancellor is called upon to exercise a sound discretion. He must determine whether the facts which existed at the time of the decree have so materially changed that there is no longer

any reasonable apprehension of injury. In the words of Mr. Justice Cardozo:

> "The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. * * * Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."
>
> *United States vs. Swift & Co.,* 286 U. S. 105, 119.

The State Court is clearly an appropriate forum for the determination of this issue of fact. Having observed the original tendencies to and responsibility for disturbance and violence, the State Court is in the better position to weigh the evidence, draw inferences from the conceded facts, and to choose between conflicting inferences.

The fact that injunction is essentially a preventive remedy, designed to guard against future injury, does not mean that the mere discontinuance by the petitioners of their wrongful and illegal acts under the compulsion of a court order, or their mere statement that they have abandoned the intent to commit the wrongful acts, compels a court of equity to modify the injunction. This was explicitly recognized in the *Meadowmoor* case. The question always remains whether the temptation to resume still exists, whether the opportunity for abuse has been removed, and whether the momentum of fear has been spent. Nothing in the Fourteenth Amendment prohibits a state from basing "protection against future coercion on an inference of the continuing threat of past misconduct."

The State Court in the instant case found that the picketing was "so enmeshed with contemporaneously violent conduct" that petitioners' action was intended to coerce rather than to persuade.

> "In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though further picketing might be wholly peaceful. So the Supreme Court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection."
>
> *Meadowmoor* case, 312 U. S. 287, 294.

This Court recognizes constantly the importance of maintaining the balance of our federal system and though it has "zealous regard for the guaranties of the Bill of Rights," it also gives "due recognition to the powers belonging to the state." The State Court is an appropriate forum to settle the issues of fact and to draw inferences from established facts. This Court gives deference to State Court determinations of factual questions unless it clearly appears that the State Court's findings are spurious and are a palpable evasion of constitutional guaranties. This Court has therefore ruled that if the question presented is the sufficiency of evidence to support a finding, it does not raise a substantial federal question.

> *New York, ex rel., Consolidated Water Co. vs. Maltbie,* 303 U. S. 158.

(2) The decision of the State Court was clearly justified.

Besides the recital of the history of this litigation, the motion for modification contained nothing except a general statement that the passage of time, plus a change of law, presently entitles petitioners to picket Mrs. Crosby's restaurant. They allege that by the passage of time the "past acts of force, threats, or intimidation" have "lost any coercive influence or effect * * *." These are merely the conclusions of the pleaders. They are nothing more than their protestations of reform, their naked assertions that their previous victims have forgotten the petitioners' acts of violence, and their promise to be good.

The chancellor was not bound to accept these promises of repentance in the light of the record before him. Throughout this litigation petitioners have denied responsibility for the acts of violence. No court has believed petitioners' prior assertions that they were not responsible for the acts of violence in the face of the overwhelming evidence against them. The protestations by aggressors of their peaceful intentions are accepted only by the credulous. Reasonable people, familiar with the history of their past activities and promises, are dubious of appeasement.

The exact form of order which petitioners have sought by their motion to modify had been tried by the Ohio Court in this case and while that order was in effect a major portion of the violence in this case was committed.

The record of this case shows that at the inception of this litigation the respondent consented to an order permitting limited picketing and restraining violence only. (*Petition for Writ of Certiorari,* page 2.) The Ohio Court gave this order a fair trial for three months and while such an order was in effect the reign of terror described in our statement of the case occurred. (*Petition for Certiorari,* pages 21 and 22.)

Moreover, there has been no change whatsoever either in the circumstances or the law between the time of the final decree and the filing of the instant motion to modify. Every fact, claim and rule of law now relied on was available when the challenged decree was entered. The controversy which evoked the decree remained unsettled and the reasons for the decree still existed. Certainly mere compliance with the injunction did not constitute ground for its vacation.

Petitioners' reference to a lapse of three and a half years is misleading. The Ohio courts follow the general equity rule that the extent of relief granted is determined

by the facts as they existed at the time of the decree and not as they were at the inception of the litigation. This rule has been applied to deny an injunction in a labor case where the facts materially changed by the time of the hearing in the Court of Appeals.

> *Schur-Hirst Co. vs. Amalgamated Clothing Workers,* 5 Ohio Law Abstract 551 (Court of Appeals, Eighth Judicial District).

After the Common Pleas Court had granted the permanent injunction in Mrs. Crosby's case, the petitioners had ample opportunity to prove to the Court of Appeals that the force of the violence had been dissipated. Under Ohio practice petitioners were entitled to and had as of right, a trial *de novo* in the Court of Appeals.

> *Dehmer vs. Campbell,* 124 O. S. 634.

However, petitioners offered no additional evidence. They elected to proceed on the record made in the Court of Common Pleas, supplemented by two stipulations not material here. No proof was offered then, almost two years later, that the taint of force had been removed.

The final decree in the *Crosby* case was actually entered on June 30, 1941 after this Court had decided both the *Swing* and *Meadowmoor* cases (R. 32). Undoubtedly the Ohio court then felt that upon all the evidence Mrs. Crosby was then entitled to the decree that is now in effect. Had it then concluded differently, it then had the power to adjust its decree. It did not do so.

Unless abuse is glaringly apparent, this Court must assume that in the consideration of petitioners' motion to modify the State Court re-examined the record and the decree in the light of the recent decisions of this Court and denied the motion, in the exercise of a sound discretion.

The Ohio courts have shown no tendency to defy the decisions of this Court in apposite cases but have, on the contrary, followed them respectfully.

Evans v. Retail Clerks, 66 O. App. 158, 32 N. E. (2d) 51;

Friedman v. Cincinnati Local Joint Board, case No. 6032, Court of Appeals, First Appellate District of Ohio, reversing *Friedman vs. Cincinnati Joint Board*, 20 Oh. Op. 473.

The record shows that less than two months elapsed between the actual entry of the final decree in this case and the motion to modify it (R. 32, 28). Nothing had changed in that interval. Everything urged in support of the motion could have been urged with equal force against the entry of the decree. All past violence had ceased under the command of an injunction, but the fear of its continuance and the belief in its coercive effects were as rational on July 21, 1941 as they were on June 30, 1941. The extensiveness of the past violence was adequate reason for entering the injunction on June 30, 1941 and was equally adequate for refusing to modify it less than two months later. Again quoting Mr. Justice Cardozo:

> "Whatever persuasiveness the reasons then had, is theirs with undiminished force today."
>
> *United States v. Swift & Co.*, 286 U. S. 105, 115.

In sum, all of the claims made in the motion to modify are really addressed to the merits of the question whether the decree should have been granted in the first place. Petitioners' motion is a mere device to re-litigate the original issue which was "solemnly adjudged" after a protracted contest all the way through this Court, namely, whether under the facts in this case the petitioners should be permitted to picket Mrs. Crosby's restaurant. That determination will not be lightly undone by the mere dis-

claimer by petitioners of an intention to resume their unlawful conduct. It is high time this controversy is put to rest.

"One trial of an issue is enough."

Treinies v. Sunshine Mining Co., 308 U. S. 66.

Respectfully submitted,

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